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## SOME LEGAL ASPECTS OF THE CONFISCATION ACTS OF THE CIVIL WAR

IT is the purpose of this article to examine some of the legal problems involved in the enforcement of the federal confiscation acts during the Civil War. So questionable a war measure as the general confiscation of the enemy's private property naturally encountered opposition, and it should not be a matter for surprise that the enactment of these laws occasioned a long and trying parliamentary struggle, while the friction caused by their enforcement proved extremely annoying to the judicial officers of the government. The interpretation of the acts, moreover, presented to the judges of the period tasks which called for more than ordinary intellectual bravery.

To trace the policy of confiscation to its origin would perhaps be impossible since it arose from widely scattered sources, but the earliest official suggestion looking to the forfeiture of "rebel" property seems to have been that of Secretary of the Treasury Chase, who, in 1861,<sup>1</sup> before the matter came up in Congress, urged the financial advantages of confiscation. A formidable array of petitions received in Congress from loyal citizens in various parts of the North and even of the South during the year 1861-1862 indicates that the subject had attracted a lively attention throughout the country.<sup>2</sup> But a factor of far more influence was the action of the Confederate government in sequestering northern debts. A Confederate statute of May 21, 1861, forbade the payment of debts due to northern individuals or corporations, authorizing their payment into the Confederate treasury, and an act of August 30 provided for the sequestration of the property of "aliens", by which term was meant all those adhering to the Union cause.<sup>3</sup> In view of these acts it was urged in Congress that, aside from the general question of the justice of confiscation, a sweeping measure of forfeiture had

<sup>1</sup> *Finance Report*, 1861, pp. 12-13.

<sup>2</sup> During the month from April 1 to May 1, 1862, the following petitions regarding confiscation were received in the House: from Citizens of Wisconsin (*House Journal*, 37 Cong., 2 sess., p. 494); Citizens of Marion County, Indiana, p. 499; Citizens of Ohio, p. 567; Citizens of Springfield, Ohio, p. 620; of Warren County, Ohio, p. 624; of Hamilton County, Ohio, p. 634; of Cincinnati, Ohio, p. 634. See also *Senate Journal*, 37 Cong., 2 sess., pp. 90-692, *passim*.

<sup>3</sup> *Statutes at Large, Provisional Government of the Confederate States of America*, p. 201.

practically been forced upon the Union government by the action of the enemy.

The first confiscation law, a measure of limited scope, applying only to property (including slaves) actually employed in the aid of insurrection, was introduced in the first session of the Thirty-Seventh Congress in the summer of 1861.<sup>4</sup> It was urged by such radical leadership as that of Thaddeus Stevens of Pennsylvania,<sup>5</sup> considered with as much deliberation as the crowded business of this short session would allow, and became a law on August 6. So far as the pure principle of confiscation was concerned, these debates were unimportant. The absorption of Congress in more pressing matters, and the introduction of the amendment regarding slaves prevented a full discussion of the constitutional and legal merits of the confiscation question. Indeed it was only in the House of Representatives, and there but briefly, that the real issue of confiscation was debated at all. We must look therefore to the next session of the Thirty-Seventh Congress for a full treatment of the difficult points involved.

It requires laborious application to follow the second confiscation measure along its tortuous course through the long session of the Thirty-Seventh Congress. The subject was under frequent consideration during the whole of this session from December, 1861, to the following July. On the opening day, December 2, Senator Lyman Trumbull of Illinois, a radical Republican, gave notice of his intention to introduce "a bill for the confiscation of the property of rebels and giving freedom to the persons they hold in slavery";<sup>6</sup> on the 5th he presented his bill with brief arguments in its support;<sup>7</sup> later as chairman of the Committee on Judiciary he redrafted the measure,<sup>8</sup> and it was around this nucleus that legislative confiscation developed. According to Trumbull's bill, the property of all persons out of reach of ordinary process of law who were found in arms against the United States or giving aid or comfort to the rebellion, was to be forfeited, the seizures to be carried out by such officers, military or civil, as the President should designate for the purpose. There were no enumerated classes, the liability of forfeiture being based simply upon participation in the rebellion. The bill in this stage differed widely from the measure which was finally enacted, but the debates are none the less instructive, since most of those who spoke dealt with the general question rather than with details.

<sup>4</sup> July 15, 1861. *Cong. Globe*, 37 Cong., 1 sess., p. 120. For the final statute see *Stat. at Large*, XII. 319.

<sup>5</sup> *Cong. Globe*, 37 Cong., 1 sess., p. 414.

<sup>6</sup> *Ibid.*, 2 sess., p. 1.

<sup>7</sup> *Ibid.*, p. 18.

<sup>8</sup> *Ibid.*, p. 942.

In both houses the supporters of confiscation were Republicans of the more northern states, while its opponents were men of the border states and northern Democrats. The advocates of confiscation joined in urging the necessity of a measure to punish the "rebels"; stress was laid on the importance of crippling the financial resources of the Confederacy, at the same time adding to those of the Union, and it was urged that in a struggle so gigantic the Union government should exercise the supreme power of self-defense. On constitutional and legal questions, however, there was no such harmony of opinion. To raise such points as the war power of Congress, the status of the "rebels", the legal character of the Civil War, the restrictions of the attainder clause of the Constitution, the belligerent rights as against the municipal power of Congress, was to reveal a deplorable confusion of logic, and a jarring of opinions even among those who voted together. United in their notion as to the practical result sought, the supporters of confiscation, it would seem, had as many different views regarding the constitutional justification of their measure as there were individual speakers. Among the opponents of confiscation, inconsistencies and contradictions were no less frequent. Some of the speakers regarded the measure as too extreme; others denounced its unconstitutionality; others spoke for a policy of clemency or argued the inexpediency of the project.

As the discussion proceeded the possibility of securing a plan upon which all could agree became fainter. While the question would not down, each time of its recurrence seemed to present new difficulties. Motions to substitute radically different measures for the bill in hand, motions to postpone, motions to refer, and motions to amend, were continually being pushed, but these only served to delay and prolong the deliberations, and many a formidable speech on the merits of the question was delivered when in reality the matter before the House was one of parliamentary routine. Finally, after months of intermittent debate, after the appointment in each house of a select committee,<sup>9</sup> the matter was adjusted by a conference committee of both houses,<sup>10</sup> and thus a measure was evolved which passed the two branches of Congress.

As finally passed, the second confiscation law bore the title, "An Act to suppress Insurrection, to punish Treason and Rebellion, to seize and confiscate the Property of Rebels, and for other Purposes."<sup>11</sup> The first four sections, drawn from the Senate bill, relate

<sup>9</sup> Cong. Globe, 37 Cong., 2 sess., pp. 1846, 1991.

<sup>10</sup> Ibid., p. 3166.

<sup>11</sup> Stat. at Large, XII. 589. The expression "other purposes" referred to those sections of the statute which provided for the forfeiture of slaves.

to the crime of treason and rebellion and prescribe punishments. Sections 5 and 6 declare the forfeiture to the United States of the property of certain specified classes of "rebels". A distinction was made between two main groups. The property of all officers whether civil, military, or naval, of the Confederate government or of any of the "rebel" states, and of citizens of loyal states giving aid or comfort to the rebellion, was declared seizable at once without qualification. Other persons in any part of the United States who were engaged in or aiding the rebellion were to be warned by public proclamation and given sixty days in which to return to their allegiance; if they failed to do so their property was to be confiscated. Proceedings against suspected property were to be instituted in the federal district or circuit courts, and the method of trial was to conform as nearly as might be to that of revenue or admiralty cases. If found to belong to a person who had engaged in rebellion, or who had given it aid or comfort, the goods were to be condemned "as enemy's property" and to become the property of the United States. The proceeds were to be paid into the treasury of the United States, and applied to the support of the armies. Three important sections, referring to slaves, do not concern us here. By section 13 the President was given power to pardon offenses named in the act.

An analysis of the vote on this measure shows that the division resulted from a complication of sectional with party interests. In the House of Representatives the count stood eighty-two to sixty-eight.<sup>12</sup> Of the supporters of the bill,<sup>13</sup> seventy-seven were Republicans representing constituencies north of the Ohio. All but three of the Democrats who voted opposed the bill. No such solidarity was to be found in the majority party, for twenty of the Republican or Unionist members answered "nay". Of the twenty-five border state men all but three voted with the opposition.<sup>14</sup> In the Senate the measure received twenty-seven affirmative and thirteen negative votes.<sup>15</sup> Eight of those voting in the negative were border state men, while only seven were thorough Democrats, showing again the large part which sectional sympathies played in determining the vote.

But the measure was not yet law. President Lincoln, who had

<sup>12</sup> *Cong. Globe*, 37 Cong., 2 sess., p. 2361.

<sup>13</sup> The three Democrats who favored the bill were: William G. Brown, from the loyal portion of Virginia, John Hickman, a Douglas Democrat from Pennsylvania, and John W. Noell, a Union Democrat of Missouri.

<sup>14</sup> Besides Brown and Noell the only border state man who favored confiscation was the intense Unionist and friend of Lincoln, Francis P. Blair of Missouri.

<sup>15</sup> *Cong. Globe*, 37 Cong., 2 sess., p. 3276.

never expressed more than a mild approval of confiscation, objected to several features of the congressional bill and prepared a rather elaborate veto message.<sup>16</sup> The measure, he said, would result in the divesting of the title to real estate forever. "For the causes of treason", he pointed out, "and for the ingredients of treason not amounting to the full crime", it declared forfeitures extending beyond the lives of the guilty parties. This feature of the bill the President regarded as a violation of the attainder clause of the Constitution. Further he argued that the act by proceedings *in rem* would forfeit property "without a conviction of the supposed criminal, or a personal hearing given him in any proceeding". When it was known in Congress that President Lincoln intended to veto the bill, a rather unusual proceeding was resorted to. A joint resolution was rushed through both houses which was intended as "explanatory" to the original measure.<sup>17</sup> In accordance with this resolution, the law was not to be construed as applying to acts done prior to its passage,<sup>18</sup> nor "as working a forfeiture of the real estate of the offender beyond his natural life". Although this left an important part of his objections untouched (*i. e.*, as to the condemnation of property without allowing a personal hearing to the supposed criminal), Lincoln approved the measure in its modified form, and on the last day of the session, July 17, 1862, he signed the act and the explanatory resolution "as substantially one".<sup>19</sup>

These widely different measures of confiscation were put into operation side by side, and remained so during the war.<sup>20</sup> By the terms of each of the statutes, the forfeiture of property was made a strictly judicial process, enforced through the federal district courts under the direction of the Attorney-General and the district attorneys. Information concerning confiscable property might reach the federal officials through regular channels, as by the deposition of a United States commissioner; it might be supplied gratuitously by some citizen informer, or it might be secured by the interception of letters and despatches intended for Confederate owners. The

<sup>16</sup> *Senate Journal*, 37 Cong., 2 sess., July 17, 1862, pp. 872-874; *National Intelligencer*, July 18, 1862.

<sup>17</sup> *Stat. at Large*, XII. 627; *Cong. Globe*, 37 Cong., 2 sess., p. 3380.

<sup>18</sup> In *Conrad v. Waples*, 96 U. S. 279, it was decided that confiscation under the act of July 17, 1862, applied only to the property of persons who might thereafter be guilty of acts of treason and disloyalty. For judicial interpretation of the duration feature of the resolution, see *Wallach v. Van Riswick*, 92 U. S. 208; *Bigelow v. Forrest*, 9 Wallace 339.

<sup>19</sup> *Senate Journal*, 37 Cong., 2 sess., July 17, 1862, pp. 871-872.

<sup>20</sup> The existence of the two acts side by side produced not a little confusion. Prosecutions in a given case might be instituted under either act or under both, according to the circumstances. In the Wiley case (*Annual Cycl.*, 1863, p. 220) the libel was under the act of 1861, and the proof under that of 1862.

application of the laws, it must be remembered, was limited to those districts where federal courts were in operation, and, since jurisdiction depended upon *situs*,<sup>21</sup> the property contemplated for seizure must be located in the north though owned by "rebels".

In beginning suit, a libel of information, analogous to that denounced against smuggled goods, would be filed with the district attorney; a monition or public advertisement would then be issued by the marshal summoning the owner to appear in court and establish his loyalty; then would follow, at its proper time on the docket, the suit itself, and in case of condemnation, the marshal would be directed to sell the property at public auction, turning the proceeds, after the payment of costs, into the public treasury.

The difficulties of enforcing these acts made the work exceedingly distracting to the officials. No distinct department of justice existed at that time<sup>22</sup> and the office of the Attorney-General, to whom legal questions were referred, was inadequate to the handling of any considerable amount of business.<sup>23</sup> Both the published reports and the manuscript records of the office indicate that its machinery was slow in starting, and it seems to have encountered considerable friction when it did start. Upon the difficult legal questions which arose in connection with the initiation of proceedings, there was considerable confusion of thought in the minds of the district attorneys, and little help in this matter was secured from the office of the Attorney-General who invariably "declined to advise the law officers of the government as to what constitutes a proper case for action under the law".<sup>24</sup> The local officers, thus left to their own responsibility, naturally hesitated to bring action, and this difficulty was augmented by the fact that no regular provision was made for defraying the preliminary expenses of preparing a suit in cases where the government might fail to secure conviction.

Taken all together, therefore, this seemingly smooth and workable method of seizure was seen to involve serious obstacles. The

<sup>21</sup> A district court in New York, for instance, could not acquire jurisdiction over the stock of an Illinois corporation. *U. S. v. 1756 Shares of Stock*, 27 Fed. Cas. 337.

<sup>22</sup> The establishment of the department of justice did not take place until June 22, 1870. *Stat. at Large*, XVI. 162.

<sup>23</sup> The total monthly pay-roll at this period amounted to only \$1522.06, while the schedule of salaries showed only eight employees in the entire office, the Attorney-General, assistant attorney-general, chief clerk, four assistant clerks, and one messenger. (These data are revealed in the files of the Attorney-General's office, Washington, for September, 1864.)

<sup>24</sup> Acting Attorney-General T. J. Coffee to R. I. Milton, U. S. Commissioner, Albany, New York, September 2, 1861. (Letter-Book "B 4", Dept. of Justice, p. 147. A series of such letters of instruction was issued to district attorneys and marshals during the same month. The one cited is merely typical.)

very correctness and completeness of the judicial process made it impracticable in a strenuous time when things had to be done quickly, and when a dilatory execution would seem to defeat the whole purpose of the law. It was natural under the circumstances for an impatient general or provost-marshall to take the law into his own hands and by his summary action become involved in disputes with the judiciary. These vigorous men regarded confiscation as a war measure, and proceeded to carry it out as such.<sup>25</sup> It was doubtless the purpose of Congress, however, to guard carefully the exercise of a power so formidable, and one which might be put to so great abuse.

In view of these distracting conditions the lax and irregular enforcement of the acts will not cause surprise. Though a considerable litigation was occasioned, the net results, after deducting the heavy judicial costs,<sup>26</sup> and after allowing for cases dismissed, appealed, "settled without suit", or in which the judgment was entered for the claimant, were almost incredibly small.<sup>27</sup> In New York, \$19,614; in Louisiana, \$67,973; in West Virginia, \$11,000; in Indiana, \$5,737—these sums, so far as mere financial totals can.

<sup>25</sup> Instances of conflict between civil and military officers regarding confiscation were not uncommon. A dispute arose over a military seizure of property in Washington belonging to John A. Campbell, Confederate assistant secretary of war. *House Ex. Doc.* 44, 37 Cong., 3 sess. For General Lew Wallace's action in directing extensive military seizures in Maryland see *Official Record*, third series, IV. 407, 413, 431.

<sup>26</sup> The costs attached to the filing and publication of the libel, and the fees charged by the district attorney, clerk, and marshal, always reduced by a large proportion the balance remaining to the United States. The following case presents a rather striking coincidence, the various items of expense forming a total which corresponds exactly to the amount of the proceeds. Files of U. S. District Court for Indiana, case no. 205, January 17, 1863.

Proceeds of sale (of "credits etc.") .....	\$202.00
Marshal's costs .....	51.36
Marshal's fees .....	63.27
Docket fees .....	40.00
Clerk's costs .....	44.12
Clerk's fees .....	3.25
Balance for United States treasury .....	\$202.00
	0.—

<sup>27</sup> An examination of the docket books and files of the federal district court in Indiana reveals 83 cases of confiscation between September, 1862, and May, 1865. Of these, 44 resulted in forfeiture. The property seized was miscellaneous in character, including real estate, credits, cash, judgments in court, commercial stocks, government bonds, cotton, whiskey, a stallion, and a steam-engine. In the District of Columbia, from May, 1863, when condemnations began, to September, 1865, the number of cases docketed was 52, and the number of forfeitures 27. The totals given in the annual reports of the solicitor of the treasury are unsatisfactory, since he combines confiscation suits with forfeitures under non-intercourse regulations, and sometimes with prize cases. See *Finance Reports*, 1863, p. 90, 1864, p. 88.

tell the story, are representative of the extent of the confiscations. According to a report of the solicitor of the Treasury Department dated December 27, 1867, the total proceeds actually paid into the treasury up to that time amounted to the insignificant sum of \$129,680.<sup>28</sup> In comparison with these figures, the confident predictions of the supporters of confiscation in Congress as to the material weakening of the enemy's resources sound strange indeed. This plausible justification, then, of a policy so extreme as that of general confiscation was based on an unfortunate miscalculation. Enough indeed was done to work individual hardship, and to add to the bitter feelings following the war, but the comparatively few transfers of property gave the Union government no material advantage at all sufficient to justify so questionable a war measure. Financially, it may be said, confiscation was a failure, while the other purpose of the act, that of punishing the "rebels", was very unequally accomplished.

In the field of judicial interpretation the confiscation problem proved equally as troublesome as in Congressional debate or in its official enforcement. The relation of confiscation to the rules of international law was, to begin with, the source of continual confusion. When the confiscation policy was under discussion both sides appealed to the law of nations for a support of their claims. As usual in such controversies, much would have been gained if the direct issue had been clearly stated and kept in mind. Freed from its entanglements the question amounts to this: Does the law of nations allow to a belligerent in a public war the right to confiscate whatever property, within reach of its courts, belongs to the enemy? Numerous misapprehensions and inaccuracies, however, entered into the actual discussion of this issue. There was great difference of opinion as to the applicability of the rules of international law to the conflict than waging. Was the struggle to be regarded as a domestic rebellion, or a public war? Were those supporting the Confederate

<sup>28</sup> *Sen. Ex. Doc. 58, 40 Cong., 2 sess.* This report of the solicitor was based upon the financial returns which marshals were required to make to the Treasury Department. The total which it shows does not include the returns in the District of Columbia, amounting to \$33,265, which were deposited in the registry of the court and later restored to the owners. It excludes also the proceeds of the Virginia confiscations, because of the fact that the clerk of the district court of that state was a defaulter to the extent of \$91,579.29. The proceeds of the Kansas cases were not reckoned in for a similar reason. By the addition of such sums as these the net proceeds of confiscation will be seen to approximate \$275,000. (Considerable unpublished material relating to the Virginia confiscations, comprising letters, receipts, depositions, and reports of investigating officers, may be found in the files of the Miscellaneous Division of the Treasury Department, marked "Cotton and Captured Property Record, 1370". Regarding the Kansas cases, see *Osborn v. U. S.*, 91 U. S. 474.)

cause to be treated as rebels or as enemies? In a civil war, is a nation restricted by the rules of international law in its operations against the insurgent power, or may it punish these insurgents by municipal regulations?

But, assuming that the legal character of the Civil War had been determined, a further difficulty remained. There was commonly a failure, in the debates, to discriminate between a general confiscation of property within the jurisdiction of the confiscating government, and the treatment accorded by victorious armies to private property found within the limits of military occupation. Thus the general rule exempting private property on land from the sort of capture which similar property must suffer at sea, was erroneously appealed to as an inhibition upon the right of judicial confiscation.<sup>29</sup> That a military capture on land analogous to prize at sea was not regarded as a legitimate war measure was so obvious and well recognized a principle that it would hardly require a continual reaffirmation. It was a very different matter, however, so far as the law and practice of nations was concerned, for a belligerent to attack through its courts whatever enemy's property might be available within its limits. Where the language was accurate, it was this form of seizure that was contemplated whenever confiscation was claimed as a belligerent right. In this connection much was said about the relation between conqueror and vanquished, which was also beside the point.

When after the war the question of confiscation as a belligerent right was presented to the Supreme Court<sup>30</sup> the legal precedents were various and doubtful.<sup>31</sup> Though the trend of modern usage

<sup>29</sup> Even Dunning, in his *Essays on the Civil War and Reconstruction*, though he treats directly the principles of international law involved in the confiscation policy, gives no place to this distinction between military seizure and judicial confiscation. "In the modern practice of civilized nations", he says, "the general confiscation of enemies' private property is unknown. It is as obsolete as the poisoning of wells in an enemy's country. As a rule, real estate is left to its owners, and movables are appropriated only so far as military necessity, as judged by the commander in the field, seems to demand it." Dunning then continues the discussion, still with reference to the treatment of private property by military officers, and for authority refers to the passage in Halleck which deals not with confiscation by judicial process within the jurisdiction of the confiscating state, but with the treatment of property by generals in military occupation of a part of the enemy's country. See Dunning, *Essays*, pp. 31-32.

<sup>30</sup> *Miller v. U. S.*, 11 Wallace 268.

<sup>31</sup> Among the early authorities on international law whose opinion would carry weight in America, Vattel and Puffendorf favored the milder practice, Burlamaqui and Rutherford did not deal directly with the form of confiscation adopted during the Civil War, while Bynkershoek was among the few to state in its bald severity the extreme right of the belligerent over the enemy's property. To derive any clear authority for confiscation from these early writers requires

favored the milder practice, the court, without arguing the points of international law involved, rested the justification for the second confiscation act upon the law of nations. The measure was sustained on this broad basis as an "undoubted belligerent right" and was construed as the exercise of a war power, not as a municipal regulation. It is to be observed that there underlay this decision a presumption which had caused much controversy and honest difference of opinion—a presumption which was not rendered less conspicuous by the omission of arguments drawn from the domain of international law. The question was a fair one whether the right of confiscation could be clearly claimed on the basis of the law of nations, and this was a point of much larger importance and greater difficulty than would be indicated by the off-hand assertion of the court that Congress in passing the second confiscation act was exercising "an undoubted belligerent right". It has been an accepted practice in our courts to recognize international law as a "part of our law",<sup>32</sup> and while the judicial branch of the government would not be likely to invalidate a law of Congress on the ground that it

a rather sympathetic editing. Vattel, *Law of Nations* (Luke White ed., Dublin, 1792), bk. III., sec. 76; Puffendorf, *Droit de la Nature et des Gens*, liv. VIII., ch. v., sec. xvii ff.; Burlamaqui, *Principles of Natural and Political Science* (Nugent transl., Boston, 1792), pp. 375 ff.; Rutherford, *Institutes of International Law* (second Am. ed., 1832), ch. ix., *passim*; Bynkershoek, *Quæstiones Juris Publici* (1737), lib. I., ch. 7, p. 175. In the case of *Ware v. Hylton*, 3 Dallas 199, argued before the Supreme Court in 1796, many prominent American jurists of the time expressed opinions upon the right of confiscation. John Marshall, arguing for Virginia's claim to certain British debts sequestered during the Revolution, declared emphatically for the general right of confiscation, but his attitude was that of an advocate not a judge, and his interpretation of the authorities was not infallible. Later, as Chief Justice, Marshall prepared the opinion of the Supreme Court in *Brown v. U. S.* (8 Cranch 110), a case involving the right of the United States government to seize British property found on land at the commencement of the War of 1812. Basing his sweeping conclusion upon the partial citation of authorities submitted by the counsel for the appellant, Marshall wrote: "It may be considered as the opinion of all who have written on the *jus belli*, that war gives the right to confiscate, but does not itself confiscate the property of the enemy." A special act, so the court held, was necessary to authorize such seizures. Story went even further in his dissenting opinion and maintained that the right of confiscation vested at once in the executive on the outbreak of war, without the express provision of any statute. When one seeks the authority which these men quote, however, he is apt to find, in the passage cited, a treatment of capture, or booty, or the levy of contributions—topics quite distinct from confiscation. Story's reference to Puffendorf as a supporter of confiscation is an example of this stretching of the authorities. (8 Cranch 143.) Of the later writers, Kent favored the sterner rule, while Wheaton emphasized the milder practice which, however, he declared to be "not inflexible". Kent (*Comm.*, eleventh ed.), I. 66-67; Wheaton, *International Law* (Boyd ed.), pp. 410, 413.

<sup>32</sup> *Hilton v. Guyot*, 159 U. S. 163; *Ware v. Hylton*, 3 Dallas 281; the *Paquette Habana*, 175 U. S. 700.

violated the rules of international law, it usually takes care to consider these rules as fully as possible, and even to interpret the intent of Congress in the light of such rules. Even though one may not deny the soundness of the position assumed by the Supreme Court, there is still room for the wish that so important a subject had been handled with less superficiality.

When we study the problem of rebel status in relation to confiscation another series of legal tangles emerges. Though the question of such "status" might appear chiefly theoretical and involve much abstract reasoning, yet it seemed an inevitable requirement of the laws of intellect that men who discussed confiscation should have in mind some guiding principle, either expressed or implied, as to the legal standing of persons engaged in the rebellion. In this connection, therefore, the question bore directly upon the larger legal problems which the Civil War called forth. Here arose the same difficulty which presented itself in connection with the treatment of Confederate privateers, the blockading of southern ports, and the non-intercourse laws.<sup>33</sup> In a different phase the question again forced itself upon the attention of the government after the war when reconstruction issues were pending and the policy of pardon and amnesty was urged by the President and opposed by the radicals of Congress.

At first sight the situation would seem to resolve itself into a simple alternative. On the one hand, the severity of the law of treason could be invoked, and the insurgents could be held liable to treatment as criminals. In this case the government would be acting in the capacity of a sovereign punishing its rebellious citizens for their violation of allegiance. Or, on the other hand, the rebellion could be regarded as a public war, and all the privileges and amenities prescribed by the law of nations for the treatment of belligerents could be accorded to the Confederacy. The government, in taking this attitude, would appear to be laying aside its sovereign control over the South, and opposing the Confederate states only as a belligerent would oppose his enemy. The struggle would then be a clash *between governments*, not a conflict of individuals against their government. There was, however, a third possibility which would be most likely to commend itself to an administration guided by a spirit of expediency or practical opportunism rather than of rigid adherence to consistent principles. Instead of selecting one or the other of the two alternatives as an exclusive rule of conduct, the

<sup>33</sup> The well-known work of Professor Dunning, *Essays on the Civil War and Reconstruction*, contains the best general discussion of these legal problems which the writer has found.

government could suit the rule to the occasion, and adopt whichever course might appear most suitable in a given situation. The theory of traitor status was, in the opinion of many, a convenient justification for certain severe measures which were more or less directly contemplated and which could rest on no other accepted principle, as for instance the condemnation after the war of the principal Confederate leaders under domestic criminal law. It became apparent at once, however, that this severe principle could not be adhered to rigidly. In the ordinary conduct of the war it was the *jus belli*, not the *lex talionis* which must govern the armies. In the declaration of blockade and in the treatment of privateers as public enemies instead of pirates, the administration followed the only rational and humane course possible, but in these particulars the insurgents were undoubtedly recognized as belligerents.

So far the way seemed clearly marked out by the plain dictates of reason and humanity, and there was no serious difference of opinion. When the question of confiscation was reached, however, there was no generally conceded principle around which all could unite, and it was in this connection that the difficulty regarding rebel status reached its most acute stage. The subject was beclouded rather than clarified by the debates. On the one hand the rebels were referred to as red-handed, black-hearted pirates, and traitors,<sup>34</sup> unworthy of claiming a single belligerent right. On the other hand they were represented as a regularly constituted governmental power with an organized administration in control, an authorized army in the field, and with all the attributes of a belligerent in a public war.<sup>35</sup>

It remained for the Supreme Court, in a few clear-cut decisions, to present what seems the only practical solution of the problem, by adopting the convenient and flexible principle of the double status of the rebels. In the Amy Warwick case Justice Sprague thus expressed the views of the majority of the court: "I am satisfied that the United States as a nation have full and complete belligerent rights, which are in no degree impaired by the fact that their enemies owe allegiance and have superadded the guilt of treason to that

<sup>34</sup> See speeches of Elliot of Massachusetts in the House of Representatives (*Cong. Globe*, 37 Cong., 2 sess., p. 2234), Howard of Michigan (*ibid.*, p. 1717), and Davis of Kentucky (*ibid.*, p. 1759).

<sup>35</sup> The words of Blair of Pennsylvania, who favored confiscation, present a good statement of the principle of belligerent status: "What are our relations to these rebellious people? They are at war with us, having an organized government in the cabinet, and an organized army in the field, and I hold that in the conduct and management of the war on our part we are compelled to act towards them as if they were a foreign Government of a thousand years' existence, between whom and us hostilities have broken out." *Cong. Globe*, 37 Cong., 2 sess., p. 2299.

of unjust war."<sup>36</sup> A similar expression is that of Justice Grier in the Prize Cases: "The law of nations . . . contains no such anomalous doctrine as that which this court are now for the first time desired to pronounce, to wit: That insurgents who have risen in rebellion against their sovereign, expelled her courts, established a revolutionary government, organized armies, and commenced hostilities, are not *enemies* because they are *traitors*; and a war levied on the government by traitors, in order to dismember and destroy it, is not a *war* because it is an '*insurrection*'.<sup>37</sup> Again, in *Miller v. United States*: "Whatever may be true in regard to a rebellion that does not rise to the magnitude of a war, it must be that when it has become a recognized war those who are engaged in it are to be regarded as enemies."<sup>38</sup>

With this statement of the broad theoretical problem in mind we may now turn to a detailed phase of the question of rebel status in which its practical application and its bearing upon individual rights stand out clearly. One of the common difficulties confronting the courts in the enforcement of the confiscation acts was to decide whether, in the seizure of property of persons adhering to the rebellion, opportunity should be given to the supposed "rebel" to appear in court and plead his case. On the one hand stood the principle that an enemy has no standing in court, while on the other hand the very nature of the proceeding under the confiscation acts was such that judgment must rest upon a determination of the fact as to whether or not the party was actually engaged in the rebellion—a point on which the owner could claim a right to be heard. Moreover it was ably contended that a quasi-criminal character<sup>39</sup> pertained to confiscation proceedings, requiring the same strict construction of the law in the interest of the accused as belongs to actions brought under a criminal indictment. Such construction

<sup>36</sup> 2 Sprague 123.

<sup>37</sup> 2 Black 670. See also pp. 672 and 673. As to the necessity of some concession of belligerent rights in the case of a formidable rebellion, see *Williams v. Bruffy*, 96 U. S. 187. There the Supreme Court declared that such concessions depend upon "the considerations of justice, humanity, and policy controlling the government".

<sup>38</sup> 11 Wallace 309.

<sup>39</sup> The Supreme Court is authority for the statement that actions in confiscation were "in no sense criminal proceedings", and were "not governed by the rules that prevail in respect to indictments or criminal informations". The only subject of inquiry in such cases, in the opinion of the court, was the liability of the property to confiscation, and persons were referred to only to identify the property. (The Confiscation Cases, 20 Wallace 104-105. In this case there were three dissenting judges.) For a vigorous statement of the view that the confiscations partook largely of the nature of criminal statutes, see Field's dissenting opinion in *Tyler v. Defrees*, 11 Wallace 331, and Lincoln's proposed veto message; *Senate Journal*, 37 Cong., 2 sess., July 17, 1862, p. 873.

would certainly not deny to the suspected "rebel" all opportunity whatever of conducting a defense in court.

The practice during the war on this point was uncertain and frequently detrimental to the interests of the accused. In the district court for the eastern district of Virginia a general rule was prescribed which disallowed a hearing in the case of persons adhering to the rebellion.<sup>40</sup> In a case tried before Judge Betts of the southern district of New York in July, 1863, the defendant, a resident of Alabama,<sup>41</sup> duly filed an answer to the allegations set forth in the libel of information against his property, but the judge ordered this answer to be stricken from the files on the ground that the defendant was an "alien enemy", and hence had no *persona standi* in a court of the United States.<sup>42</sup> An able criticism of Judge Betts's position is to be found in the *Annual Cyclopedie* for 1863. The writer points out that if Betts's doctrine was correct "the mere fact of Mr. Wiley's [the defendant's] residence in a southern insurrectionary state precludes him from appearing and contesting the allegations of the libel that he has rendered active aid to the rebellion. . . . Under such a practice every dollar of property owned by Southern citizens in the North, no matter how loyal, need only be seized under an allegation of disloyal practices, and as the accused cannot be heard to deny that allegation, (and if he remains silent no proof of it is required), the whole matter is very summarily disposed of to the great comfort and advantage of the informer, and to the increment of his personal possessions."

This question whether a rebel should have a hearing in a federal court on the issue of the condemnation of his property waited till after the war for its settlement by the Supreme Court. The case was that of *McVeigh v. U. S.*—one of the prominent confiscation cases.<sup>43</sup> In its facts the case resembled that in which Judge Betts had given his radical decision. A libel of information had been filed in the eastern Virginia district to reach certain real and personal property of McVeigh who was charged with having engaged in armed rebellion. McVeigh appeared by counsel, interposed a claim to the property, and filed an answer to the information. By motion of the district attorney, however, the appearance, answer, and claim were stricken from the files for the reason that the respondent was a "resident of the city of Richmond, within the Confederate lines, and a rebel". The property was condemned and ordered to be sold. When the case reached the Supreme Court the

<sup>40</sup> *Semple v. U. S.*, 21 Fed. Cas. 1072.

<sup>41</sup> *Annual Cycl.*, 1863, p. 220.

<sup>42</sup> *Jecker v. Montgomery*, 18 Howard 112, and cases cited.

<sup>43</sup> 11 Wallace 259; see also *Windsor v. McVeigh*, 93 U. S. 274.

judgment was reversed, and the action of the district attorney unanimously condemned. The court held that McVeigh's alleged criminality lay at the foundation of the proceeding, and that the questions of his guilt and ownership were therefore fundamental in the case. The order to strike the claim and answer from the files on the ground that McVeigh was a "rebel" amounted to a pre-judgment of the very point in question without a hearing. The court below in issuing this order had acted on the theory that no enemy of the United States could have standing in its courts, but the higher tribunal refused to allow such an application of this principle. On this fundamental question, therefore, the Supreme Court was committed to the proposition that a "rebel" should not be denied the right to a hearing in connection with the seizure of his property by a federal court. Had this conclusion been pronounced early enough to produce uniformity of practice during the war, and had the Supreme Court itself maintained this principle consistently, the advantage of the McVeigh decision would have been far greater than was actually the case.

A problem more fundamental perhaps than any of the above was that which concerned the constitutionality of the confiscation acts. It was not surprising that this legislation which had been enacted against the judgment of many of the ablest thinkers in Congress, which had barely escaped the presidential veto, and which had occasioned the greatest uncertainty in its judicial enforcement, should have to meet sooner or later that peculiar ordeal to which all American laws are liable—the test of constitutionality. The wonder is that the test was deferred so long, for it was not until 1871 that the matter of constitutionality was made a direct issue before the Supreme Court. The case was that of *Miller v. United States*—a proceeding under both of the confiscation acts to forfeit certain shares of railroad stock in two Michigan corporations.<sup>44</sup> The information filed against this stock alleged it to be the property of Samuel Miller, a Virginia "rebel". An essential feature of the case was the fact that Miller had disregarded the notice and the district court in Michigan, without a hearing of the case, had entered a decree of condemnation by default. Miller's attorney complained that the acts of Congress on which the seizure and the condemnation by default had been based were unconstitutional, involving a violation of the fifth and sixth amendments, which have to do with the guarantees of due process of law and of property rights.

The court met the defendant's objections by a liberal reliance on

<sup>44</sup> 11 Wallace 304 ff.

the "war power" and by reference to earlier decisions in which related problems had been settled. The primary question of the nature of the Civil War had been fully treated in the Prize Cases,<sup>45</sup> where the court had defined the conflict as one of sufficient magnitude to give the United States all the rights and powers appropriate to a foreign or national war. The belligerent rights of the United States, then, were not diminished by the fact that the conflict was a civil war. In the same decisions the relation of the Union government to the insurrectionary districts was dealt with, and the rights both of a sovereign and a belligerent were held to belong to the government of the United States. The court proceeded on the basis of these previous decisions to analyze the confiscation acts and defend their constitutionality. The most important problems before the court under the head of constitutionality were: first, to decide under what category to place confiscation, *i. e.*, whether to regard it as the exercise of war power or as a municipal regulation; and second, to deal with the objection that the act violated the fifth and sixth amendments relating to rights of property and of impartial trial. As to the first of these problems the court laid down the doctrine that the confiscation acts were not passed as a municipal regulation but as a war measure. With a tone of certainty which, as we have seen, the precedents hardly warranted, the court declared that "this is and always has been an undoubted belligerent right". Congress had "full power to provide for the seizure and confiscation of any property which the enemy or adherents of the enemy could use for the purpose of maintaining the war against the government". The act of 1861, and the fifth, sixth, and seventh sections of the act of 1862, were therefore construed as an enforcement of the belligerent rights which Congress amply possessed during the Civil War.

Having thus placed the confiscation acts within the category of war measures, the court found little difficulty in meeting the objection that the acts involved a violation of the fifth and sixth amendments. The relevant provisions in these amendments are that no person shall be deprived of his property without due process of law, and that in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed. The acts, as we have above noted, permitted judgment on default without a jury trial, without a personal hearing, and without a determination of the facts as to the guilt of the owner. It was admitted by the court that if the purpose of the acts had been to punish

<sup>45</sup> 2 Black 673.

offenses against the sovereignty of the United States, *i. e.*, if they had been criminal statutes enacted under the municipal power of Congress, there would have been force in the objection that Congress had disregarded its constitutional restrictions. Since however the acts were passed in exercise of the war powers of the government, they were held to be unaffected by the limitations fixed by the fifth and sixth amendments.

Three of the judges, Field, Clifford, and Davis, dissented from this opinion. Their grounds of disagreement were that the forfeitures in question were punitive in their nature, being based on the municipal not the war power of Congress, that condemnations must depend on the personal guilt of the owner, that judgments against the property should only result from proceedings *in rem* to ascertain the guilt or innocence of the supposed offender, and that therefore a judgment based on mere default in such cases would amount to a denial of "due process of law". These words of the dissenting judges not only agree exactly with one of the important points in Lincoln's objections, but they harmonize very well with the position of the Supreme Court itself when dealing with the problem whether a "rebel" should have a hearing. We noticed in connection with the McVeigh case that the court insisted upon the necessity of a hearing to determine the question of the owner's alleged rebellion. The dissenting judges in the Miller case were merely applying this same principle to the case of default. It was not even necessary, said the majority of the court, to conduct an *ex parte* hearing after the default. The entry of the default in due form was to be regarded as establishing all the facts averred in the information, as in the case of confession, or of actual conviction on evidence. It was this principle which, according to the minority view, would involve serious judicial usurpation, and "work a complete revolution in our criminal jurisprudence". To the thoughtful student this view of the minority judges seems but a natural protest against an extreme and unjust claim. The dissenting position appears still stronger when it is remembered that the majority judges admitted the incompetency of Congress to allow such judgments as the confiscation acts permitted on the basis of municipal law, and that the "war power" theory was the convenient door of escape from this constitutional difficulty.

The above survey will perhaps be insufficient to convey a complete impression, omitting as it does all reference to the restoration of property, and to the various forms of *virtual* confiscation which

were quite apart from the confiscation acts.<sup>46</sup> It may however suggest the difficulty and uncertainty with which the courts labored in executing these unusual measures. It is often the case with mooted points of law that the period of the greatest diversity of opinion is also the period when the number of cases involved is greatest, and when therefore the pressure upon the judicial authorities is heaviest. In the case of these legal difficulties regarding confiscation their final settlement did not occur until after the war; in some cases so long afterward that the issue was practically dead, and little benefit could be secured from the decisions as guides to the lower tribunals. When during the war we find doubt on such fundamental points as the constitutionality of the law itself, and the question as to whether a rebel could be heard in his own defense, we need no longer wonder that judicial action in these cases was so often unsatisfactory. When in addition to this we remember that during the war both Congress and the courts did their work under heavy pressure, and sometimes in haste and confusion, we can better understand such mistakes and shortcomings as appear in connection with the execution of the confiscation policy. To carry out a war measure by peaceful process is a rather anomalous undertaking, yet this is what the strict judicial enforcement of the confiscation policy amounted to. We must remember, too, that these measures were exceptional, that they could be justified only on extreme grounds, and that they touched human nature in a very weak place.

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<sup>46</sup> Forfeitures under the direct tax levy, for instance, were so conducted as to amount, virtually, to confiscation. For the laws, see: *Stat. at Large*, XII. 294, 422; for a report of the extent of these seizures see: *Cong. Globe*, 42 Cong., 2 sess., p. 3387; for the confiscation of Robert E. Lee's estate at Arlington, Virginia, after the form of a "tax sale", see: *Sen. Misc. Doc.* 96, 43 Cong., 1 sess.; *Cong. Rec.*, 43 Cong., 1 sess., vol. II., pt. 3, p. 2812; 47 Cong., 2 sess., vol. XIV., pt. 3, p. 2680; *ibid.*, pt. 4, p. 3361; case of *U. S. v. Lee*, 106 U. S. 196; *U. S. Stat.*, 47 Cong., 2 sess., ch. 141, p. 584.